

COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY STATE BOARD ON
ELECTRIC GENERATION AND TRANSMISSION SITING

In the Matter of:

THE APPLICATION OF ESTILL)	
COUNTY ENERGY PARTNERS, LLC,)	
FOR A CERTIFICATE TO CONSTRUCT)	CASE NO. 2002-00172
A COAL COMBUSTION/ELECTRIC)	
GENERATING FACILITY)	

O R D E R

In response to timely motions for intervention by Will Herrick ("Herrick") and DLX, Inc., and Harry Laviers, Jr., Trustee ("DLX"), this Board issued an Order on the morning of July 21, 2004, allowing both parties to intervene. Near the end of the previous day, the Applicant in this case, Estill County Energy Partners, LLC, had filed responses to the two motions. With regard to the Herrick motion, Applicant took no position on whether his motion should be granted, but Applicant opposed the DLX motion to intervene. Because of the timing of the Applicant's responses and the Board's Order, the Board was not able to address the issues the Applicant raised, but we do so in this Order.

First, as a preliminary matter, the Board did not expect the Applicant's responses, especially to the DLX motion. Applicant not only failed to inform the Board it wanted to file in opposition to the motions, but it had indicated to Board staff that it indeed did not oppose either motion. Moreover, any opposition should have been filed promptly after the motions to intervene were filed. Under the compressed procedural schedule required in this case, Intervenors were required to file their data requests one

week after their motions to intervene were due, or on July 21, 2004. Thus, while neither the Board's regulations nor the procedural schedule in this case state a deadline for opposing motions to intervene, a response in opposition filed the day before intervenor data requests were due cannot be considered timely. Nevertheless, the Board will address the merits of the responses.

1. Real Property Issues. Applicant maintains that the Board has no jurisdiction over any of the issues arising from the real property litigation referenced in both the DLX motion and Applicant's response. The Board agrees that it has no jurisdiction to decide the title issues currently pending in the Bankruptcy Court or, for that matter, any other real property title disputes.

Nevertheless, in Section 2.2 of its application, Applicant states, "The Site is owned by Fox Trot Properties, LLC, an affiliate of ECEP." The accuracy and veracity of statements in the application are valid issues, and an intervenor is entitled to show that the title is in dispute. In response to both DLX and the Applicant, however, the Board affirms that it will not adjudicate the merits of the real estate claims described in the DLX motion to intervene.

2. Jurisdiction. The Board further states that the issues to be litigated in this case are limited to those delegated by the General Assembly in Chapter 278 of the Kentucky Revised Statutes. Thus, to the extent any party, including DLX and Herrick, raises issues beyond that jurisdiction, the Board will decline to consider them. The Board will, however, exercise its full jurisdiction necessary to decide the questions and issue the Orders required by the statutes.

3. Hearings. DLX requested an evidentiary hearing in this case. The procedural schedule already calls for such a hearing in Frankfort on August 24 and, in answer to Applicant's request, the Board clarifies that no additional evidentiary hearing will be scheduled. The schedule calls for a local hearing on August 5 as well, but that hearing is for local input and not for testimony from parties.

4. Standing to Intervene. In the July 21 Order granting the requested interventions, the Board found "that these interventions are likely to present issues and develop facts that will assist the Board in fully considering the matter without unduly complicating or disrupting the proceedings." While the Applicant did not oppose the Herrick intervention, the response to the DLX motion argues at page 6 that, "the Motions do not meet the applicable criteria for intervention and should be denied. See KAR 5:110 Section 4."

The Board reaffirms its Order granting the DLX intervention. In its motion, DLX cites an interest in the same or nearby property. KRS 278.712(4) reads: "Any interested person, including a person residing in a county or municipal corporation in which the facility is proposed to be constructed may, upon motion to the board, be granted leave to intervene as a party to a proceeding held pursuant to this section." The claimed property rights establish the "special interest in the proceeding" referenced in the regulation the Applicant cites.

IT IS THEREFORE ORDERED that:

1. In keeping with its jurisdictional limits, the Board will not adjudicate the merits of the real estate claims described in the DLX motion to intervene or any other issues beyond those delegated to it by Chapter 278 of the Kentucky Revised Statutes.

2. Because the August 24 hearing in Frankfort satisfies DLX's request for an evidentiary hearing, the Board denies its motion for an additional evidentiary hearing.

3. The Board reaffirms its Order granting the DLX and Herrick interventions.

Done at Frankfort, Kentucky, this 23rd day of July, 2004.

By the Board

ATTEST:


Executive Director
Public Service Commission
on behalf of The Kentucky State Board on
Electric Generation and Transmission Siting